COPY

PETITION NOT PRINTED

In the

Supreme Court of the United States

October Term, 1960

No. 116

STUART W. NEWSOM,
Petitioner

v.

W. FRANK SMYTH, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Respondent

BRIEF AND APPENDIX ON BEHALF OF RESPONDENT

A. S. HARRISON, JR.
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

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BRIEF ON BEHALF OF RESPONDENT

OPINION BELOW

The Supreme Court of Appeals of Virginia did not write an opinion in the case at bar, but entered an order dismissing the petition for a writ of error (R. 36) and affirming the judgment of the Law and Equity Court of the City of Richmond (R. 22). The memorandum opinion of the Law and Equity Court is found in the printed record, commencing on page 23.

JURISDICTION

The petitioner purports to have invoked the jurisdiction of this Court under the provisions of U. S. C., Title 28, Section 1257(3). The petitioner has alleged that a right guaranteed to him by the due process and equal protection

of the law clauses of the Fourteenth Amendment to the Constitution of the United States has been denied him. This Court granted the petitioner's motion to proceed in *forma pauperis* and granted certiorari on May 31, 1960.

PRELIMINARY STATEMENT

Essential to the understanding of the issue presented in this appeal is a history of the proceedings in which the petitioner has heretofore been involved. In order to explain concisely the lengthy history of the petitioner's efforts in his own behalf, the proceedings which have occurred prior to the day on which this brief is written will be chronologically set forth below:

1. April 10, 1953. Petitioner was convicted of first degree murder and sentenced to life imprisonment, pursuant to the verdict of the jury, by the Judge of the Hustings Court of the City of Richmond, Part II. Petitioner was represented by counsel of his own choosing (R. 11).

2. April 18, 1953. Petitioner wrote to the Trial Judge noting an appeal from his conviction (R. 13).

3. April 23, 1953. Petitioner wrote to the Trial Judge and requested him to appoint an attorney to appeal petitioner's conviction to the Supreme Court of Appeals of Virginia (R. 14).

4. March 23, 1956. Petitioner filed a petition for a writ of habeas corpus in the Hustings Court of the City of Richmond, Part II, and counsel was appointed to represent him. He alleged that he had been tried by a jury of eleven persons.

5. November 1, 1956. A *nunc pro tunc* proceeding was filed by the Commonwealth to correct the typographical error in the record in the case of *Commonwealth of Virginia* v.

Stuart Newsom; a Rule to Show Cause was entered and an attorney was appointed to represent Newsom.

6. November 12, 1956. A hearing was held in the *nunc pro tunc* proceeding. Evidence was taken and an order was entered correcting the judgment order of conviction to show that the jury was composed of twelve persons. An attorney was appointed to assist Newsom in perfecting an appeal, which appeal was later abandoned at Newsom's direction. Newsom is now detained under this order.

7. March 1, 1957. After a full hearing, at which the petitioner testified and was represented by counsel, the petition for a writ of habeas corpus was dismissed by the judge designate of the Hustings Court of the City of Richmond, Part II.

8. October 16, 1957. The Supreme Court of Appeals of Virginia denied a petition for a writ of error to the judgment of the Hustings Court of the City of Richmond, Part II, of March 1, 1957.

9. March 3, 1958. The Supreme Court of the United States denied certiorari to the judgment of the Supreme Court of Appeals of Virginia of October 16, 1957, 355 U. S. 904, 2 L. Ed. 2d 538, 78 S. Ct. 553.

10. April 11, 1958. The Judge of the United States District Court for the Eastern District of Virginia denied Newsom's petition for a writ of habeas corpus (Appendix I) for the reasons stated in a memorandum opinion (Appendix II).

11. December 5, 1958. The United States Court of Appeals for the Fourth Circuit dismissed petitioner's appeal with a written opinion, 261 F. 2d 452 (Appendix III).

12. April 20, 1959. The Supreme Court of the United States denied certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit of December 5, 1958, 359 U. S. 969, 3 L. Ed. 2d 837, 79 S. Ct. 833.

13. June 3, 1959. The Law and Equity Court of the City of Richmond denied Newsom's petition for a writ of habeas corpus (R. 22).

14. October 13, 1959. The Supreme Court of Appeals of Virginia denied Newsom's petition for a writ of error to the judgment of the Law and Equity Court of the City of Richmond of June 3, 1959 (R. 36).

15. April 28, 1960. Newsom's petition for a writ of *coram vobis* was denied by the Hustings Court for the City of Richmond, Part II (Appendix V).

16. May 31, 1960. Certiorari granted by the Supreme Court of the United States.

17. October 10, 1960. The Supreme Court of Appeals of Virginia denied Newsom's petition for a writ of error to a judgment of the Hustings Court of the City of Richmond, Part II, of April 28, 1960, wherein Newsom's petition for a writ of *coram vobis* was denied (Appendix VI).

The above mentioned proceedings will be hereinafter discussed and their relationship to the issue presented in the case at bar will be explained.

STATEMENT OF THE CASE

In January of 1959 Stuart Newsom filed a petition for a writ of habeas corpus in the Law and Equity Court of the City of Richmond. On January 29, 1959, the Honorable Robert Lewis Young, one of the judges of that Court, ad-

vised Newsom that the Court had appointed Edward B. Simpkins, Jr., Attorney at Law, to represent him in his habeas corpus proceeding (R. 18) and, on the same day, the Court entered an order making such appointment. An Assistant Attorney General of Virginia had previously advised the Court that the petitioner had not complied with the provisions of Section 8-596 of the Code, in that he had failed to enumerate the disposition of his previous habeas corpus petitions (R. 15). The petitioner then advised the Court that he had not heretofore raised the issue which he presented in the instant petition. The petitioner contending that he had been "denied due process of law and equal protection when the Husting Court, Part II, of the City of Richmond denied him an appeal from its judgment render on the 10th day of April, 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant." (R. 5). On June 3, 1959, Judge Young entered an order dismissing the petition for a writ of habeas corpus for the reason that he found "no probable cause to believe that the petitioner is detained without lawful authority." (R. 22). On October 13, 1959, the Supreme Court of Appeals of Virginia denied Newsom's petition for a writ of error. This Court granted certiorari on May 31, 1960.

QUESTION PRESENTED

Is a person who is represented by counsel of his own choosing in a state court and who is convicted of a capital offense and sentenced to life imprisonment entitled to have the Court appoint counsel, upon request, to represent him for the purpose of appealing his conviction in the absence of any allegation that he is a pauper or that his own counsel has withdrawn from the case?

ARGUMENT

A Person Who Is Represented by Counsel of His Own Choosing in a State Court and Who Is Convicted of a Capital Offense and Sentenced to Life Imprisonment Is Not Entitled to Have the Court Appoint Counsel Upon Request to Represent Him for the Purpose of Appealing His Conviction in the Absence of Any Allegation That He Is a Pauper or That His Own Counsel has Withdrawn from the Case.

This case arises from a petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond. The Petitioner set forth his ground for relief in said petition as follows:

> "No. 1. Petitioner was denied Due Process of Law and Equal Protection when the Hustings Court, Part Two, of the City of Richmond, denied him an Appeal from its judgment render on the 10th day of April 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant. See Exhibit 'C' and 'D', annexed hereto."

It is important to observe that the petitioner did not allege that he was a pauper; that he was indigent or that he was without funds after his conviction in the Hustings Court of the City of Richmond, Part II, in April of 1953. Now it is suggested, by counsel for the petitioner in his brief filed in this Court, that Newsom was indigent; that he was a pauper and that he was without funds in April of 1953. The respondent will show that the record does not support this assumption made by counsel for the petitioner.

As pointed out in the preliminary statement, it is essential to the understanding of the issue presented in this case that the prior proceedings in which the petitioner has been involved be set forth and their relationship to the case at bar be explained. In this connection we have included in the Appendix the order of the United States Court for the Eastern District of Virginia, Norfolk Division, denying and

dismissing Newsom's petition for a writ of habeas corpus (Appendix I). The memorandum opinion of Honorable Walter E. Hoffman, the United States District Judge who entered the aforementioned order of April 11, 1958, is printed as Appendix II. This Court can, of course, take judicial notice of a habeas corpus proceeding brought in a federal court. *Wells* v. *United States*, 318 U. S. 257, 87 L. Ed. 746, 63 S. Ct. 582. Judge Hoffman wrote a lengthy opinion setting forth the entire history of the petitioner's efforts to secure his release. The pertinent portions of this opinion will be briefly summarized.

On April 10, 1953, petitioner was brought before the Hustings Court of the City of Richmond, Part II, to be tried on an indictment charging him with murder. He was represented by Percy S. Smith and Robert J. Smith who had been *selected and employed by the accused.* The trial judge certified the testimony of three of the witnesses and this was contained in the record before the District Court. The testimony reveals that the petitioner had been having illicit relations with the victim's wife for seven years and, when rejected by her, had shot and killed her husband. The jury brought in a verdict of life imprisonment, and the trial judge changed the form of the verdict which was then signed by the jury foreman. Counsel for the accused moved the Court to set aside the verdict, but gave no grounds in support of his motion. The accused requested additional time to summon witnesses, which request the Court denied and proceeded to sentence him in accordance with the jury's verdict. The final order, entered by the Court on April 10, 1953, listed the names of only eleven jurors, having omitted the name of one Kendrick Duncan.

Following his admission to the penitentiary, petitioner addressed a letter to the trial judge on April 18, 1953, noting

an appeal and indicating that he would attempt to secure counsel to prosecute such appeal. On April 23, 1953, the petitioner requested the trial judge to appoint counsel for the purpose of perfecting said appeal to the Supreme Court of Appeals of Virginia. Judge Hoffman said: "*It should be noted, however, that petitioner did not state that he was a pauper, as he merely said that due to circumstances beyond his control he was unable to complete his appeal.*" (Emphasis added) No appeal was ever taken to the Supreme Court of Appeals of Virginia.

On March 20, 1956, petitioner filed a petition for a writ of habeas corpus in the Hustings Court of the City of Richmond, which court made the writ returnable to the Hustings Court of the City of Richmond, Part II. The trial judge of the latter court disqualified himself from consideration of the case and a judge was designated to hear the same. On April 4, 1956, the Hustings Court, Part II, continued the habeas corpus proceeding generally, for the reason that "there are matters presently pending before the Supreme Court of Appeals of Virginia, the adjudication of which may be determinative of matters herein."

On November 1, 1956, the Assistant Attorney for the Commonwealth of Virginia for the City of Richmond filed a motion in the original criminal proceeding requesting the entry of a *nunc pro tunc* order showing that at the trial and conviction of Newsom on April 10, 1953, the jury consisted of twelve persons, including Kendrick Duncan, rather than only the eleven names as erroneously stated in the order of April 10, 1953. An order to show cause was entered on November 1, 1956, and an attorney was appointed to represent Newsom in the *nunc pro tunc* proceeding.

A hearing was held on November 12, 1956, and, after hearing evidence and argument of counsel, a *nunc pro tunc*

order was entered by the same trial judge who presided over the original trial correcting the inadvertent omission of the name of Kendrick Duncan from the order of April 10, 1953. This order is printed for the convenience of this Court as Appendix IV. Newsom requested the appointment of counsel to prosecute a writ of error to this judgment of November 12, 1956, and an attorney was designated for this purpose. Said attorney was instructed by the petitioner to abandon the appeal in January of 1957.

On March 1, 1957, the habeas corpus matter was heard by a judge designate, and an order was entered denying and dismissing the petition. The Supreme Court of Appeals of Virginia denied a petition for a writ of error to this judgment of the Hustings Court of the City of Richmond, Part II, on October 16, 1957. The Supreme Court of the United States denied certiorari on March 3, 1958.

Thereafter, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, which court denied said petition by order of April 11, 1958. The United States Court of Appeals for the Fourth Circuit dismissed the petitioner's appeal from the judgment of the District Court on December 5, 1958. *Newsom* v. *Smyth*, 261 F. 2d 452 (Appendix III). The Supreme Court of the United States denied certiorari to the judgment of the United States Court of Appeals on April 20, 1959.

Thereafter, the petitioner filed his petition for a writ of habeas corpus in the Law and Equity Court, which petition was denied on June 3, 1959. The Supreme Court of Appeals of Virginia denied his petition for a writ of error on October 13, 1959. On November 3, 1959, Newsom filed his petition for a writ of certiorari in this Court. While his petition for writ of certiorari was pending in this Court, he filed a peti-

tion for a writ of *coram vobis* in the Hustings Court for the City of Richmond, Part II, which petition was denied on April 28, 1960 (Appendix V). This Court granted certiorari in this case on May 31, 1960. Thereafter, Newsom filed a petition for a writ of error to the judgment in the *coram vobis* proceeding in the Supreme Court of Appeals of Virginia, which Court denied said petition on October 10, 1960 (Appendix VI). He apparently has not sought certiorari to this Court to the judgment of the Supreme Court of Appeals of Virginia of October 10, 1960.

Having set forth the petitioner's previous endeavors to secure his release, we now turn to the question as to whether or not he was entitled to have the trial court appoint an attorney to assist him in appealing his conviction of April 10, 1953. On April 23, 1953, the petitioner wrote the following letter to the trial judge:

"500 Spring Street
"April 23, 1953

"Honorable Mr. Ray Doubles
"Hustings Court Part II
"Richmond, Va.

"Your Honor:

"Due to circumstances beyond my control, I have been unable to complete arrangements with an attorney to complete my appeal.

"Therefore, I respectfully request that you appoint me counsel to appeal my case to the State Supreme Court of Appeals.

"Respectfully yours,

"Stuart W. Newsom
"#63646" (R. 14)

The petitioner's entire case is based upon this letter. He does not state why he was unable to "complete arrangements with an attorney" to assist him in appealing his case. We can only speculate as to the substance of the unstated circumstances. The trial judge was, of course, aware of the fact that the petitioner had been represented by counsel of his own choosing at his trial, and there is no indication that these two attorneys had withdrawn from the case. Indeed, if they had withdrawn from the case, Newsom did not inform the trial judge of this fact. Moreover, the petitioner did not state that he was a pauper, that he was indigent or that he was without funds and that he was, therefore, "unable to complete arrangements with an attorney" to assist him in perfecting an appeal.

Judge Hoffman, the United State District Judge who denied Newsom's petition for a writ of habeas corpus, stated in his opinion that: *"It should be noted, however, that petitioner did not state that he was a pauper as he merely said that due to circumstances beyond his control, he was unable to complete his appeal."* (Emphasis added)

Moreover, the petitioner's allegation as to the illegality of his detention is set forth in his petition for a writ of habeas corpus filed in the Law and Equity Court, and is quoted below:

> "#1. Petitioner was denied Due Process of law and Equal Protection when the Hustings Court Part Two, of the City of Richmond, denied him an Appeal from its judgment render on the 10th day of April 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant. See Exhibit 'C' and 'D', annexed hereto." (R. 4)

A careful examination of the petition for a writ of habeas corpus reveals that the petitioner did not suggest, allege,

state or contend that he was indigent on April 23, 1953. Moreover, the petitioner has never asserted in any of the various pleadings, briefs, petitions or other documents which he has filed in the Law and Equity Court, the Supreme Court of Appeals of Virginia or in this Court that he was indigent on April 23, 1953. We are, therefore, unable to understand the assumption made by counsel for the petitioner in this Court that Newsom was indigent on April 23, 1953. Indeed, the record does not show that Newsom was indigent on the day in question.

Counsel for the petitioner suggests that the Judge of the Law and Equity Court who wrote a memorandum opinion, which accompanied the order denying the relief requested, "recognized that the petitioner was in fact indigent on April 23, 1953." This assumption of petitioner's counsel is plainly without merit. Judge Young said in the first paragraph of his opinion:

> "In this proceeding the petitioner seeks a writ of habeas corpus, alleging in his petition that he was denied due process of law and equal protection of law in that the trial court 'denied' him an appeal and failed to 'aid sufficiently' a proposed appeal. The facts recited, which must be accepted as true in ascertaining whether probable cause has been shown, are to the effect that 'shortly after conviction petitioner made known his desire to petition the Supreme Court of Appeals of Virginia for a writ of error and requested the trial court to appoint an attorney to handle the matter, which was not done." (R. 23)

The facts which Judge Young accepted as true were those facts as set forth in the petition. As hereinbefore pointed out, the petition did not allege that Newsom was indigent in April of 1953. Judge Young then reviewed the

cases which deal with the constitutional right of the accused to have the court appoint counsel, both at the time of trial and in appealing his judgment of conviction. These cases necessarily deal with indigents and paupers for, of course, there is no reported case of which we are advised which holds that an accused is entitled to court-appointed counsel in a criminal proceeding when he is not indigent. In discussing these cases, Judge Young concludes his opinion with this paragraph:

> "With us an accused is entitled to one fair trial involving 'no bending or breaking of his constitutional rights.' Michie's Jurisprudence, Vol. 5, p. 368. Neither in the state or federal constitution is to be found any provision requiring counsel for a proposed application for a writ of error. In the case of mere errors committed by the trial court relief may be sought at the suit of the convicted person in the usual way. Detention under color of a void conviction, for which relief may be granted by habeas corpus, must involve an absence of a valid law the violation of which was charged, a lack of jurisdiction in the trial court of the crime charged or of the person [fol. 32] of the accused, or a failure of the trial court to accord to the accused those procedural safeguards guaranteed to him by the state and federal constitutions. The petition for habeas corpus in the instant case fails to allege any of these things." (R. 31)

Nowhere in this lengthy opinion does Judge Young state, or even suggest, that Newsom was indigent in April of 1953. It is, therefore, manifest that Judge Young did not assume or recognize that Newsom was without funds in April of 1953.

To date, the only person who has even suggested that Newsom was indigent is the able and experienced attorney

who has been appointed to represent the petitioner before this Court. Newsom did not advise the Judge to whom his letter of April 23 was addressed that he was without funds and unable to secure counsel. The pleadings heretofore filed in the case at bar have been prepared and signed by the petitioner. Newsom has never even suggested that he was indigent on April 23, 1953. The record before this Court is silent as to the financial condition of the petitioner in April of 1953. In view of this fact, and for the reason that the petitioner does not and has never alleged or claimed that he was indigent, it is manifest that he was not a pauper at the time he made his request for court-appointed counsel to assist him in perfecting an appeal to the Supreme Court of Appeals of Virginia.

The petitioner asserts in his brief that the trial court deprived him of his constitutional rights under the Fourteenth Amendment when the Judge failed to appoint counsel to assist him in appealing his conviction of April 10, 1953. He points first to some of the many cases which held that an indigent defendent is, under the Fourteenth Amendment, entitled to have counsel to represent him in the trial court. *Uveges* v. *Pennsylvania* (1948), 335 U. S. 437, 93 L. Ed. 127, 69 S. Ct. 184. We fully agree with petitioner's contention. Indeed, the Supreme Court of Appeals of Virginia has long recognized the fundamental right of an accused to have the assistance of counsel. *Barnes* v. *Commonwealth* (1895), 92 Va. 794, 23 S. E. 784.

Petitioner argues that this Court "has made the further definite indication that the right to counsel should not terminate at the end of the trial, but must continue throughout the intricacies of appeal." In support of this argument, he cites *Johnson* v. *United States* (1957), 352 U. S. 565, 1 L. ed. 2d 953, 77 S. Ct. 550, and *Ellis* v. *United States* (1958), 356 U. S. 674, 2 L. ed. 2d 1060, 78 S. Ct. 974.

The *Ellis* case involved a refusal of the United States Court of Appeals for the District of Columbia to permit an indigent to appeal in *forma pauperis*. This Court noted that the appeal should not be denied until the indigent had been afforded adequate representation by counsel, and cited the case of *Johnson* v. *United States*, *supra*. In *Johnson* v. *United States*, the United States Court of Appeals for the Second Circuit had denied an indigent the right to appeal in light of the refusal of the District Judge to certify that the appeal was taken in good faith. This Court observed that "Moreover, a court of appeals, must under *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. ed. 2d 1461, 58 S. Ct. 1019, 146 A. L. R. 357, afford one who challenges that certification the aid of counsel unless he insists on being his own."

Johnson v. *Zerbst*, *supra*, involved a prisoner convicted in a federal court without counsel on a charge of possessing and uttering counterfeit money. After his trial, he apparently was not allowed to secure counsel to appeal his case. This Court's opinion, which held as stated above, was predicated upon an interpretation of the Sixth Amendment to the Constitution of the United States. Therefore, these cases have no bearing on the question presented, because the Sixth Amendment is not applicable to State court proceedings. *Betts* v. *Brady* (1942), 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252.

The petitioner argues that the right of an indigent to court-appointed counsel to assist him on appeal is within the scope of this Court's opinion in *Griffin* v. *Illinois* (1956), 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585. We will demonstrate that this argument is clearly without merit. In *Griffin* the indigent petitioners were tried and convicted of armed robbery in the State of Illinois. They petitioned the trial court to furnish them with a certified copy of the entire record, including a stenographic transcript of the pro-

ceedings. They alleged that they were paupers. The trial court denied petitioners' request. Under Illinois law it was necessary that such record be prepared. Without the same the petitioners could not appeal. Moreover, without the aid of the stenographic transcript of the trial proceedings, the petitioners could not attack errors not apparent upon the face of the record.

It is stated in the majority opinion in *Griffin* that "We must, therefore, assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioner could not get appellate review of these errors solely because they were too poor to buy a stenographic transcript." (351 U. S. 16)

In the case at bar there is no allegation that there were any errors committed in the trial court. The record is silent in this regard. Moreover, in view of the lengthy history of the petitioner's efforts to secure his release, it is manifest that there were no errors committed in the trial which would merit reversal. The petitioner, though a layman, is clearly experienced in the so-called intracacies of appeal. He has filed three separate petitions for writs of habeas corpus; he has applied for a writ of error on two occasions to the Supreme Court of Appeals of Virginia; he has appealed once to the United States Court of Appeals for the Fourth Circuit, and he has applied for certiorari to this Court on three occasions. He has shown that he is fully aware of all of the steps necessary to the filing of a petition for appeal to an appellate court. He is well versed in appellate procedure. It is, therefore, quite clear that petitioner did not need the assistance of counsel to prepare an appeal of his criminal conviction to the Supreme Court of Appeals of Virginia. Moreover, had he been successful in securing a writ of error, the cost of the printing of the record would have been paid for by the Commonwealth, if he were a

pauper. (Section 19-262, Code of Va. (1950)). He, of course, does not allege that he was a pauper. The refusal of the trial court to appoint an attorney to represent the petitioner on appeal was not a denial of the right of appeal.

The *Griffin* decision is not applicable herein for several reasons. In the first instance, Griffin and Crenshaw had alleged that they were indigent, and admittedly they were. Newsom has never made such an allegation. Griffin alleged that there were errors in the trial court, which could only be appealed with the aid of a transcript. Counsel for Illinois conceded that Griffin needed a stenographic transcript in order to secure adequate appellate review. Newsom has not alleged that there were errors in the trial court and, in so far as we are advised, there were no errors which would have merited reversal on appeal. In addition, it is quite clear, based on Newsom's many court proceedings, that he was fully capable of filing a petition for a writ of error to the Supreme Court of Appeals of Virginia if he so desired. In *Griffin* the petitioners were in effect denied an appeal. Newsom has never been denied an appeal. Mr. Justice Frankfurter pointed out in his concurring opinion in *Griffin* that:

> "The case of these petitioners is that the only adequate means of bringing for review allegedly fatal trial defects resulting in a potentially reversible conviction was a bill of exceptions which their poverty precluded them from securing. The order of the Illinois Supreme Court and the argument of the Attorney General of Illinois in support of the court's judgment apparently assumed that that was the case. * * *." (351 U. S. 24)

We have shown conclusively that the facts in *Griffin* are totally different from those in the case at bar, and that

the rule expounded by the court in that case is not applicable herein.

In *Eskridge* v. *Washington State Board* (1958), 357 U. S. 214, 2 L. ed. 2d 1269, 78 S. Ct. 1061, and *Burns* v. *Ohio* (1959), 360 U. S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164, the petitioners had been denied the right to appeal because of lack of funds. In both cases the State did not contend that the petitioners were not indigent. In *Eskridge* the petitioner sought a transcript in order to complete his appeal. In *Burns* the petitioner was barred from obtaining appellate review by action of the Clerk of the Supreme Court of Ohio. The facts in both of these cases are unlike those in the case at bar and, consequently, the court's decisions have no application here.

Moreover, *Chessman* v. *Teets* (1957), 354 U. S. 156, 1 L. Ed. 2d 1253, 77 S. Ct. 1127, is not authority for the petitioner in the case at bar. California denied Chessman the right to be present when a disputed transcript of the evidence was prepared for the purpose of appeal. This Court did not, as suggested by the petitioner, recognize "that the constitutional right to counsel continued after trial and into the appellate process." The majority of this Court recognized Chessman's right to be present in person or to be represented by counsel in such proceeding. Mr. Justice Harlan, speaking for the Court said: "We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. * * * If California chose to deny petitioner's request to appear in those proceedings in *propria persona*, it then became encumbent upon the State to appoint counsel for him." (354 U. S. 162). This indicates that a petitioner may represent himself on appeal and is only entitled to court-appointed counsel when the State denies him the right to perfect his own appeal.

The decisions of the lower Federal courts and State courts, cited by the petitioner, involved equally distinguishable factual situations, and we shall not overburden the body of this brief by discussing them.

The petitioner attempts to extend this Court's rulings that an indigent defendant is entitled to court-appointed counsel in the trial court to the appellate proceedings which may follow a judgment of conviction. Of course, the prosecution by the Commonwealth ends in the trial court. Had the petitioner chosen to appeal his conviction, the case would have been styled "Stuart W. Newsom, *Plaintiff in Error* v. Commonwealth of Virginia, *Defendant in Error*." The proceeding ceases to be a criminal prosecution when judgment is entered in the trial court and becomes a proceeding brought by the defendant as *plaintiff in error* to secure a reversal of the trial's court's ruling. It is further noted that the right of the accused to be present in the trial court at all times ceases at the conclusion of the case. It is not necessary that the convicted felon appear in the appellate court when his case is argued or when the decision is handed down. *Powell* v. *State*, 132 Tenn. 349, 178 S. W. 768. The appellate proceedings are not a continuation of the prosecution brought by the Commonwealth, but constitute a case brought by the convicted felon. If the appellate court affirms the rulings of the trial court, this does not constitute the entering of judgment against the *plaintiff in error* and require that he be present. The constitutional guarantees provided for the protection of persons accused of a crime apply to the court of original jurisdiction which pronounces sentence, and not to the appellate court. *Schwab* v. *Berggren* (1892), 143 U. S. 442, 36 L. Ed. 218, 12 St. Ct. 525.

In view of the foregoing, it is manifest that the record before this Court does not present a constitutional question

in a "clean cut, * * * concrete, and unclouded * * *" form usually demanded for a decision of constitutional issues. *Rescue Army* v. *Municipal Court of Los Angeles* (1947), 331 U. S. 549, 91 L. Ed. 1666, 67 S. Ct. 1409. To decide the constitutional question raised by the petitioner on the record before this Court would constitute a decision of a question which is not raised by the record.

The inadequacy of petitioner's request for court-appointed appellate counsel to the trial court is clear. It is noted that, at the conclusion of the *nunc pro tunc* proceeding, the petitioner, then a pauper, requested from the trial court court-appointed appellate counsel. The court immediately appointed an attorney to assist the petitioner in perfecting his petition for a writ of error. The appeal was later abandoned at the direction of the petitioner, and he is now detained under this court order. In this instance, he made a proper demand for counsel, for he stated that he was indigent.

In the case at bar, the petitioner failed to advise the trial court that he was without funds. In the absence of such a statement of poverty, an allegation of error on the part of the trial court, or a statement that petitioner's employed counsel had withdrawn from the case, it is clear that petitioner has failed to show that the trial court should have appointed counsel to assist him in appealing his conviction. In addition, it has been demonstrated that the petitioner was perfectly capable of appealing his conviction without the aid of counsel. Moreover, it is noted that petitioner has secured several adjudications of the propriety of his detention without aid of counsel. In recent months he filed a petition for a writ of *coram vobis*, which was denied by the trial court, which decision was affirmed by the Supreme Court of Appeals of Virginia.

The petitioner has cited no decision of this Court which supports the view that, in the absence of a statement of poverty or an allegation of indigency, an accused is entitled to court-appointed counsel in the trial court. It is, therefore, manifest that, in the absence of a statement of poverty, a convicted felon is not entitled to court-appointed appellate counsel. For these reasons it is quite clear that petitioner has failed to present a Federal question.

CONCLUSION

For the foregoing reasons counsel for the respondent respectfully submit that the petitioner has failed to present a Federal constitutional question, and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

A. S. Harrison, Jr.
Attorney General of Virginia

Reno S. Harp, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

APPENDIX

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISRICT OF VIRGINIA

Norfolk Division

STUART W. NEWSOM,

Petitioner

v.

W. FRANK SMYTH, JR., Superintendent
of the Virginia State Penitentiary

Respondent

Order

For reasons stated in a memorandum this day filed, it is *Ordered* that the petition of Stuart W. Newsom for a writ of habeas corpus be and the same is hereby filed without requiring the prepayment of costs and fees, and it is further

Ordered that said petition for writ of habeas corpus be and the same is hereby discharged and dismissed without prejudice to the right of said petitioner, if he be so advised, to apply to the United States District Court for the Eastern District of Virginia, Richmond Division, for an appropriate hearing with respect to the question of whether all 12 jurors were present during all necessary times throughout the trial on April 10, 1953, but without suggesting to said United States District Judge that a hearing should be granted thereon.

Let copies of the Court's memorandum and order herein be forwarded by the Clerk of this Court to the petitioner and to the Attorney General of Virginia.

(s) Walter E. Hoffman
United States District Judge

April 11, 1958
Norfolk, Virginia

APPENDIX II

Memorandum

In this proceding by way of habeas corpus petitioner, a state prisoner presently confined for the period of his natural life, seeks the issuance of an order to show cause directed out of this Court.

From the petition and attached exhibits it appear that petitioner was indicted for the murder of one James F. Brown in the Hustings Court of the City of Richmond, Part II, on July 14, 1952. Pursuant to an order of said court, he was admitted to Southwestern State Hospital for observation and report on July 31, 1952. Under date of January 6, 1953, the Hospital reported that petitioner "was not now insane and that he has not been insane or psychotic since admission".

On April 10, 1953, petitioner was brought to trial in said Hustings Court. He was represented by Percy S. Smith, a Richmond attorney, and apparently assisted by Robert J. Smith; the firm practicing under the name of Smith & Smith. These attorneys were employed and selected by petitioner. While no transcript of the evidence is available, a summary was prepared and signed by counsel under date of September 24, 1953, with the learned trial judge certifying that he had written the testimony of three of the witnesses on the day following the trial. The sordid facts are that petitioner had been having intimate relations with the victim's wife over a period of nearly seven years and, when finally rejected by the wife, petitioner shot and killed the husband.

When called upon to plead to the indictment, petitioner stood mute and the court ordered the entry of a plea of not guilty. Petitioner did not testify but presented two witnesses tending to show that the victim's wife was as much responsible for the overall situation as petitioner. No plea of in-

sanity was suggested or interposed by petitioner or his counsel.

The jury initially brought forth a verdict in the handwriting of the jury foreman reading as follows:

> "The unanimous decision of the Jury is Life imprisonment.
>
> R. H. Harvey — Foreman".

Upon noting the form of the verdict, the trial judge, according to the petitioner, declined to accept the same and, without instructing the jury to retire and deliberate further as to the form of the verdict, proceeded to write in his handwriting the following verdict:

> "We the jury on the issues joined find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at life imprisonment in the penitentiary."

The judge thereupon handed the verdict (as revised) to the jury foreman who proceeded to affix his signature and the date.

Counsel for petitioner moved the court to set aside the verdict but gave no grounds in support of his motion. The court overruled the motion and petitioner's counsel excepted. The court then asked petitioner if he had anything to say as to why sentence should not be pronounced, whereupon petitioner broke his silence and stated that he should not be sentenced as his attorney had failed to introduce certain evidence in his behalf, and further asked that he be given ten days within which to produce such evidence. The court denied this request, the defendant excepted, and the court proceeded to pronounce sentence in accordance with the period fixed by the jury.

The final order of the court entered on April 10, 1953, listed the names of only eleven jurors, having omitted the name of one Kendrick Duncan.

Following his admission to the penitentiary, petitioner addressed a letter to the trial judge on April 18, 1953, noting an appeal and indicating that he would endeavor to secure counsel. Five days later, on April 23, another letter requested the trial judge to appoint counsel for the purpose of perfecting an appeal to the Supreme Court of Appeals of Virginia.[1] According to petitioner, these letters were not acknowledged by the trial judge. It should be noted, however, that petitioner did not state that he was a pauper, as he merely said that due to circumstances beyond his control he was unable to complete his appeal. It appears that no appeal was ever taken from the final judgment of the court.

Petitioner thereafter complained to the Virginia State Bar as to the incompetency of his privately employed counsel and, according to the present application, the matter was rejected by the State Bar a few days prior to September 24, 1953. On this latter date the trial judge addressed a letter to the Parole Board recommending that petitioner *never be pardoned or paroled*. It is not clear from the record whether this letter was in response to a requested recommendation, or whether the trial judge acted on his own initiative. The letter is dated on the day following the preparation of the certification of the evidence and incidents of trial by the court and counsel.

Apparently the matter remained dormant until March 20, 1956, when petitioner filed an application for a writ of habeas corpus addressed to the Honorable W. Moscoe Hurtly, Judge of the Hustings Court of the City of Richmond, upon which application a writ was issued returnable to the Hustings Court of the City of Richmond, Part II, on April 10, 1956. The trial judge of the latter court thereupon

certified that he would be a witness in the case and stated: "I hereby disqualify myself from consideration of any of the incidents of the trial hereof." One of the Justices of the Supreme Court of Appeals of Virginia proceeded, in accordance with the law, to designate the Honorable Harold F. Snead, Judge of the Tenth Judicial Circuit, to preside in place of the Honorable M. Ray Doubles at the habeas corpus hearing.

The exhibits now presented to this court do not reveal the contents of the petition for a writ of habeas corpus in the state court but obviously one of the grounds alleged was the fact that, according to the record, the trial was conducted by a jury of eleven. This assumption is apparent as the Supreme Court of Appeals of Virginia then had before it for consideration the case of *Council* v. *Commonwealth*, 198 Va. 288, 94 S. E. (2d) 245, which was later decided on September 4, 1956. On April 4, 1956, the Hustings Court continued generally the return date of the writ previously designated as April 10, 1956, reciting that "there are matters presently pending before the Supreme Court of Appeals of Virginia, the adjudication of which may be determinative of matters herein." Petitioner filed a further petition on April 23, 1956, which was denied, but the nature of this application is not indicated.

Following the decision of the Supreme Court of Appeals of Virginia in *Council* v. *Commonwealth*, *supra*, and while the habeas corpus matter remained in a "continued generally" status, the Assistant Attorney for the Commonwealth filed a motion in the original criminal proceeding of *Commonwealth* v. *Newsom* requesting the entry of a *nunc pro tunc* order showing that at the trial and conviction of Newsom on April 10, 1953, the jury consisted of twelve persons including Kendrick Duncan, rather than only the eleven names as erroneously stated in the order of April 10, 1953. An

order to show cause was entered on November 1, 1956, an attorney was appointed to represent Newsom, and the Superintendent of the State Penitentiary was directed to produce Newsom on November 12, 1956. On this latter date, after hearing evidence and argument of counsel, an order was entered by the same trial judge who presided over the original trial; the substance of said order being to the effect that the juror, Duncan, did serve as such, and a nunc pro tunc order was entered as of April 10, 1953, inserting the name of Kendrick Duncan as one of the jurors, thereby correcting the inadvertent omission which is precisely what was held by a divided court to be proper in *Council* v. *Commonwealth*, *supra*, although the decision reversed prior holdings of the same court.

From this *nunc pro tunc* order in *Commonwealth* v. *Newsom*, the present petitioner requested the appointment of counsel to prosecute a writ of error to the judgment of November 12, 1956. An attorney was designated for this purpose and, on or about January 4, 1957, was instructed by petitioner to abandon the appeal. Out of an abundance of precaution the court entered an order directing Newsom to indicate in writing his intentions with respect to abandoning the appeal. Petitioner wrote on said order, "For lack of funds to pay cost I am forced to abandon the appeal". At the time stated, petitioner had to his credit in his spending account at the State Penitentiary the sum of $100.74. On January 22, 1957, the court entered an order relieving the court-appointed attorney from further responsibility as counsel.

The habeas corpus proceeding was then revived and, on February 12, 1957, an order was entered directing the respondent Superintendent to produce Newsom before the court on March 1, 1957. When the hearing was had the presiding judge (not the trial judge in the original criminal

proceeding) heard the evidence and argument of counsel, and thereupon entered the following order:

"This day came the petitioner, Stuart W. Newsom, in person and by counsel, and the respondent by counsel, and the whole matter of law and fact was heard by this Court.

"And it appearing to the Court from the testimony that all twelve jurors were lawfully present and together at all necessary times throughout the original trial on April 10, 1953, and that the verdict, as reworded, was affirmed by the jury as a group to be their verdict, with an individual poll of jurors being specifically waived by counsel selected by the defendant, Stuart W. Newsom, and that the final verdict of the jury is lawful and valid in all respects.

"And it further appearing to the Court that the other allegations of the petition filed herein are without merit;

"It is considered by the Court that the detention by the respondent of the petitioner under the judgment of conviction on April 10, 1953, and as amended by order of November 12, 1956, of this Court is in all respects lawful and valid.

"It is further considered by the Court that there was no denial of due process of law under the Federal or State constitution in said conviction and all matters raised by the petition with regard to said conviction were known to petitioner and his counsel at the time of said conviction and likewise within the appeal period for the said case.

"It is further considered by the Court that the prayer of the petition be, and the same is, hereby denied; and the said writ of habeas corpus is discharged and the said petition dismissed and the petitioner is remanded to the custody of the respondent.

"To all of which foregoing action of the Court the said petitioner by counsel duly excepts and objects."

The Supreme Court of Appeals of Virginia denied the writ of habeas corpus by order entered on October 16, 1957. A writ of certiorari was denied by the United States Supreme Court on March 3, 1958.

The present petition was received by this Court on March 31, 1958. Summarizing the contentions of petitioner, they appear to be:

(1) The trial judge of the state court was without authority to rewrite in his own handwriting the verdict of the jury, as he should have followed the course of directing the jury to retire after giving further instructions as to the form of the verdict; hence the verdict is void as it does not constitute the verdict of the jury.

(2) When the revised verdict of the jury was being written by the trial judge and thereafter signed by the jury foreman, one of the jurors was not present in the courtroom.

(3) Petitioner was denied the service of effective counsel.

(4) The trial judge denied petitioner a fair trial by declining to allow a period of ten days to produce evidence when this request was made immediately prior to sentencing and subsequent to the receipt of the revised jury verdict.

Where there have been prior determinations of substantially identical federal issues by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies, there is no absolute right on the part of a state prisoner to a hearing in the federal court on his application for writ of habeas corpus. If the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. *Brown*

v. *Allen*, 344 U. S. 443, 460, 463. The present application, in the opinion of the court, falls within the framework of the foregoing authority.

The order of March 1, 1957, discloses in detail the extent to which the state court sought to determine whether the juror, Kendrick Duncan, absented himself from the courtroom at any time while the trial judge was rewording the jury verdict and the foreman was signing same. It points out that the verdict, as reworded, was affirmed as a group to be their verdict, and that an individual poll of jurors was specifically waived by petitioner's personally selected attorney. It recites that all twelve jurors were lawfully present and together at all necessary times throughout the trial of April 10, 1953. The order concludes by noting that there was no denial of due process of law under the federal or state constitutions, and all matters raised by petitioner with regard to his conviction were known to petitioner and his counsel at the time of his conviction and within the appeal period.

Petitioner does not suggest wherein he could aid his cause by a rehearing of the same factual situation heard by the state court on March 1, 1957. He states that he personally observed a juror leave his seat and go into the cloakroom, and that he did not see the juror return. He indicates that, upon a hearing in this court, the entire jury panel would be called to testify. These were matters fully considered by the state court in a prior habeas corpus proceeding at which time evidence was presented. The present petition presented to the district court at Norfolk would necessitate a hearing and the attendance of twelve jurors residing in the City of Richmond. Without an affidavit from at least one of the jurors to the effect that all twelve jurors were not actually present and together at all times, the court is of the opinion

that the procedure followed should be as stated in *Brown* v. *Allen*, *supra* (p. 465):

> "As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies."

To the end that petitioner's rights may be fully protected, in dismissing the petition with respect to this phase of the case, the same shall be without prejudice to his right to apply to the district court at Richmond which is a court convenient to the place of litigation and, in the discretion of the presiding judge of that court, a hearing may be granted.

As to the authority of the trial judge to reword the verdict of the jury in his own handwriting, the material issue for determination is whether the verdict, as rewritten, affects the substantive rights of petitioner. The punishment for first degree murder is, under the Virginia law, fixed at death, life imprisonment, or a period of not less than 20 years. Code of Virginia, 1950, § 18-31. Second degree murder is punished by confinement in the penitentiary for a period of not less than 5 nor more than 20 years. Code of Virginia, 1950, § 18-32. Thus it will be seen that, in fixing petitioner's punishment at life imprisonment, the degree of guilt must have been first degree murder. The Virginia statute requires that, when a person is found guilty of murder by a jury, the jury shall "in their verdict fix the degree thereof and ascertain the extent of the punishment to be inflicted within the bounds prescribed by § 18-31 and 18-32". Code

of Virginia, 1950, § 19-223. The latter section has, however, been interpreted by the Supreme Court of Appeals of Virginia in Hobson v. Youell, 177 Va. 900, 15 S. E. (2d) 76, wherein the judgment order failed to fix the degree of guilt but imposed a sentence of fifty years' imprisonment. The court said:

> "There is no doubt or confusion as to the degree of the offense of which the petitioner was convicted, as shown in the judgment. Fifty years' confinement in the penitentiary clearly indicates that the court ascertained the petitioner to be guilty of murder in the first degree. *Eichis* v. *Com.*, 129 Va. 774, 106 S. E. 333."

Aside from the Hobson case, which is controlling, it is well settled that when a state court has jurisdiction of an indictment for murder, and the laws of the state divide that offense into two degrees and make it the province of the jury to determine under which degree the case falls, the conviction of the accused of murder in the first degree and sentence accordingly, without a finding as to which degree he was guilty of, though erroneous, is not a jurisdictional defect remediable by writ of habeas corpus. *In re Eckart*, 166 U. S. 481, 17 S. Ct. 638, 41 L. Ed. 1085.

Manifestly, therefore, the rewording of the jury verdict by the trial judge was for the purpose of correcting formal mistakes in the verdict—a duty imposed upon him by virtue of his office—the reworded verdict did not change the substance of the jury's finding. *Zedd* v. *Jenkins*, 194 Va. 704, 74 S. E. (2d) 791. While the safer practice would seem to suggest that the jury be directed to retire, after giving further instructions relating to the form of the verdict, the jury's affirmance in open court of the verdict as reworded is sufficient when the substance is not changed.

Little need be said with respect to the petitioner's contention that he was deprived of "effective" assistance of his personally selected counsel. Disgruntled prisoners frequently seek to place the blame for their conviction upon their attorneys. In alleging ineffective representation of counsel, it is incumbent upon petitioner to show not only the type of representation, but also at which point such representation violated the provisions of the Constitution. The Sixth Amendment requiring that the accused shall have the assistance of counsel does not mean that constitutional rights of an accused are impaired by mistakes or mere lack of judgment on the part of counsel. The petitioner must show that the proceedings were, in substance, a farce and a mockery of justice. *Diggs* v. *Welch*, D.C.C.A., 148 F (2d) 667; *Powell* v. *Alabama*, 287 U. S. 45; *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Brown* v. *Mississippi*, 297 U. S. 278; *Johnson* v. *Zerbst*, 304 U. S. 458. Undoubtedly there must be "effective" representation and negligence of an attorney may be one factor pointing to the violation of constitutional rights, but the instant proceeding is void of meritorious complaint during the actual trial prior to the receipt of the jury verdict other than a contention that petitioner was advised not to take the witness stand in his own defense and a reference to the fact that his attorney would not subpoena petitioner's witnesses. Petitioner fails to state the names and addresses of his proposed witnesses, and to what facts they would have testified. It is significant, however, that two witnesses testified at request of petitioner or his counsel. To accept petitioner's argument that habeas corpus should now be granted because his attorney advised him not to testify would open the gates of all prisons. Once again, petitioner does not intimate what his testimony would have been. The complaint that counsel

failed to state his grounds for the motion to set aside the jury verdict is equally without merit. Motions of this type are frequently made by counsel for the sole purpose of protecting rights in the event of appeal. Clearly counsel's conduct during the trial was not such as to impose a duty upon the court to intercede in petitioner's behalf.

The final point raised by petitioner is that, after the verdict and before pronouncement of sentence, petitioner personally requested an extension of ten days to secure witnesses to testify in his behalf. Witnesses are intended to be heard at the time the jury is hearing the case. The point contended by petitioner is frivolous. Moreover, petitioner again failed to disclose the identity of such witnesses and the nature of their testimony.

No good purpose could be served by granting a hearing in Norfolk on petitioner's application. He has received a fair and impartial trial and, while his petition is replete with charges of bias directed at the trial judge, no facts are stated which reflect that condition during the actual trial. Merely because the trial judge thereafter expressed his views against petitioner's parole and described him as a "cold-blooded murderer" carries no suggestion that bias existed in the administration of the court's judicial functions either during the trial or thereafter.

An order will be entered accordingly.

(s) Walter E. Hoffman
United States District Judge

Norfolk, Virginia
April 11, 1958

APPENDIX III

The following is extracted from 261 Federal Reporter, 2d Series, pages 452-454:

STUART W. NEWSOM,

Appellant,

v.

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary,

Appellee.

No. 7747

United States Court of Appeals
Fourth Circuit.

Argued Nov. 3, 1958.

Decided Dec. 5, 1958.

Habeas corpus proceeding brought by state prisoner. The United States District Court for the Eastern District of Virginia at Richmond, Sterling Hutcheson, Chief Judge, denied writ, and the prisoner appealed. The Court of Appeals, Haynsworth, Circuit Judge, held that where, under Virginia laws, sentence of life imprisonment is permissible upon conviction of murder in first degree but not for any lesser offense and unanimous decision of jury was for life imprisonment, it was apparent that jury intended to find defendant guilty of murder in first degree, and changing verdict by trial judge, who rewrote verdict to include finding that defendant was guilty of murder in first degree, was correction of the formal omission and not a change in the substance of finding of jury.

Appeal dismissed.

1. **Habeas Corpus — 113(6)**

Where state prisoner filed petition for writ of habeas corpus in federal court upon questions previously litigated in state courts and then undertook an appeal without certificate of probable cause, reviewing court would examine record and consider written and oral arguments of court-appointed counsel, but, finding no merit in prisoner's contentions, appeal would be dismissed for want of certificate of probable cause.

2. **Criminal Law — 996(1)**

The inadvertent omission of name of one juror in final order, after correction does not preclude subsequent finding based upon abundant evidence, that all twelve jurors were in fact present at all relevant times during trial.

3. **Criminal Law — 1208(3)**
Homicide — 354

Under Virginia law, jury is required to fix punishment of one convicted of homicide within the limits prescribed by statutes for the different offenses, and life imprisonment is permissible upon conviction of murder in first degree, but not permissible for any lesser offense.

4. **Criminal Law — 890**

Where, under laws of Virginia, sentence of life imprisonment is permissible upon conviction of murder in first degree but not for any lesser offense, and unanimous decision of jury was for life imprisonment, it was apparent that jury intended to find defendant guilty of murder in first degree, and change in verdict by trial judge, who rewrote verdict to include finding that defendant was guilty of murder in first degree, was correction of formal omission and not a change in the substantive finding of jury.

5. Habeas Corpus — 34

Federal District Court was not required to grant writ of habeas corpus as requested by defendant convicted in state proceedings and hold a further hearing to redetermine factual issues already resolved in state court proceedings upon basis of adequate records and testimony.

6. Habeas Corpus — 25.1(6)

Where defendant had been charged with murder of husband of his paramour and witnesses offered in his behalf had sought not to exculpate defendant but to implicate the paramour as having some moral responsibility for the crime, defendant's counsel's determination as matter of trial tactics, not to put his client upon witness stand, could not convert trial into a farce or a mockery of justice and did not entitle defendant to writ of habeas corpus on ground of insufficiency of his personally selected counsel.

7. Habeas Corpus — 25.1(1)

Where defendant had a full trial, he was not entitled to retrial upon basis of an unsupported statement that he would like additional time to produce unidentified witnesses whose possible testimony was not disclosed.

H. B. Mutter, Baltimore, Md. (Walter E. Black, Jr., Baltimer, Md., on brief), court-appointed counsel, for appellant.

Stuart W. Newsom, pro se, on brief.

Thomas M. Miller, Asst. Atty. Gen. of Virginia (A. S. Harrison, Jr., Atty. Gen. of Virginia, on brief), for appellee.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

HAYNSWORTH, Circuit Judge.

[1] By a petition for a writ of habeas corpus, this state prisoner sought a hearing upon questions previously fully litigated in the state courts. He now undertakes an appeal to this Court without a certificate of probable cause. In accordance with our usual practice, we have examined the record and have considered the written and oral arguments of court-appointed counsel, but, finding no merit in the prisoner's contentions, the appeal will be dismissed for want of the certificate of probable cause. Presley v. Peppersack, 4 Cir., 227 F. 2d 325; Parker v. Warden, Maryland Penitentiary, 4 Cir., 198 F. 2d 72; Tyson v. Swenson, 4 Cir., 198 F. 2d 308; Hanson v. Warden, Maryland Penitentiary, 4 Cir., 198 F. 2d 470; Hobbs v. Swenson, 4 Cir., 199 F. 2d 268; Harris v. Swenson, 4 Cir., 199 F. 2d 269; Cumberland v. Warden, Maryland Penitentiary, 4 Cir., 227 F. 2d 310.

The principal contentions arise out of the circumstances surrounding receipt of the verdict in the trial court. The defendant was tried upon an indictment for murder, and the jury brought in a verdict in the following form:

> "The unanimous decision of the Jury is Life imprisonment.
>
> R. H. Harvey — Foreman."

The trial judge refused to accept the verdict in that form, but rewrote the verdict in the following language:

> "We the jury on the issues joined find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at life imprisonment in the penitentiary."

The foreman of the jury signed the revised form of the verdict.

[2] The prisoner contends that one of the jurors had absented himself at the time the irregular verdict was submitted and the revised form of the verdict was signed by the foreman of the jury. In support of his contention, he points to the final order which listed the names of only eleven jurors. Thereafter, however, a motion was filed in the original criminal proceeding to correct the record by adding the name of one Kendrick Duncan to the list of jurors. A hearing was had pursuant to an order to show cause, at which the defendant and his court-appointed counsel were both present. Testimony was taken and, thereafter, an order was entered "nunc pro tunc," as of the date of the original final order, adding the name of Duncan to the list of jurors and correcting what was found to have been an inadvertent omission in the preparation of the original order. There had been doubt under the laws of the State of Virginia of the power of a trial court of that State thus to correct inadvertent omissions in its records, but that doubt was removed by the decision of the Supreme Court of Appeals of Virginia in Council v. Commonwealth, 198 Va. 288, 94 S. E. 2d 245. The inadvertent omission of the name of one juror in the final order, after correction, does not preclude the subsequent finding based upon abundant evidence, that all twelve jurors were in fact present at all relevant times during the trial. Council v. Commonwealth, supra; C. C. Bradley v. W. Frank Smyth, Jr., 4 Cir., 255 F. 2d 45.

Thereafter, upon petition for a writ of habeas corpus in the state court, a further hearing was held before another judge during which the prisoner was contending, among other things, that the twelfth juror was not present and that the revised form of the verdict was not affirmed by the jury as a whole. Again, the defendant was present in person and was represented by counsel. The state court found from the testimony that all twelve jurors were in fact present and

together at all relevant times during the trial, and that all twelve affirmed as a group the revised form of verdict, an individual poll of the jurors having been specifically waived by the defendant's counsel.

[3, 4] Under the laws of Virginia, the jury is required to fix the punishment of one convicted of a homicide within the limits prescribed by the statutes for the different offenses. Life imprisonment is permissible upon a conviction of murder in the first degree, but is not permissible for any lesser offense. It is plain, therefore, that the jury, instructed as to their duty to prescribe the punishment, intended to find the defendant guilty of murder in the first degree, a finding which appears to have been abundantly supported by the testimony. The change in the form of the verdict, therefore, was the correction of a formal omission and not a change in the substantive finding of the jury. Hobson v. Youell, 177 Va. 906, 15 S. E. 2d 76; Zedd v. Jenkins, 194 Va. 704, 74 S. E. 2d 791; In re Eckart, 166 U. S. 481, 17 S. Ct. 638, 41 L. Ed. 1085.

[5] The two principal contentions having been fully considered after hearings in the state courts, the District Court was not required to grant the writ and hold a further hearing to redetermine the factual issues already resolved in the state court proceedings upon the basis of adequate records and testimony. Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469.

[6, 7] The petitioner sought to raise in his petition in the District Court other points which do not clearly appear to have been raised by him in the state courts. He attacks the sufficiency of his personally selected counsel, who conducted his defense in the original trial, principally because his coun-

sel failed to have the prisoner take the witness stand and did not specify the grounds of his motion to set aside the verdict. He also contends that he should have been granted additional time, after the verdict, in which to produce additional witnesses in his behalf, but he did not identify the prospective witnesses or suggest the nature of the testimony he hoped to obtain. Clearly these contentions are without merit. The prisoner had been charged with the murder of the husband of his paramour and the witnesses offered in his behalf had sought not to exculpate the defendant but to implicate the paramour as having some moral responsibility for the crime. Obviously, it cannot be said that counsel's determination, as a matter of trial tactics, not to put his client upon the witness stand, under these circumstances, converts the trial into a farce or a mockery of justice. Indeed, it may be the wise or even the only prudent course to take. Having had a full trial, the defendant clearly is not entitled to a retrial upon the basis of an unsupported statement that he would like additional time to produce unidentified witnesses whose possible testimony was not disclosed.

Since there appears to be no merit in the prisoner's contentions, the members of this Court decline to issue a certificate of probable cause and the appeal will be dismissed.

Appeal dismissed.

APPENDIX IV

VIRGINIA:

In the Hustings Court of the City of Richmond, Part II, the 12th day of November 1956.

COMMONWEALTH OF VIRGINIA, *Plaintiff,*

against

STUART W. NEWSOM (W), *Defendant.*

Order

Stuart W. Newsom (w), who was heretofore on April 10, 1953, convicted in this Court of murder and sentenced to life imprisonment in the Penitentiary, was this day led to the bar in the custody of the Sergeant of the City of Richmond, and also came McC[redacted]igan, his attorney previously appointed by the Court to represent him in this proceeding; whereupon, the Court heard the evidence on behalf of the Commonwealth and the defendant upon the Rule To Show Cause entered herein on November 1, 1956 and made returnable to this day.

Counsel for the defendant moved the Court to provide a Court Reporter at the expense of the Commonwealth to record these proceedings, which Motion the Court overruled, and to which action of the Court the defendant, by counsel, objected and excepted.

And it appearing from the evidence that the order heretofore entered herein on April 10, 1953, is defective in that it did not name Kendrick Duncan as one of the jurors sworn to try this case; and it further appearing to the Court from the Clerk's original Jury List used by counsel for the Commonwealth and the defendant for the purpose of striking jurors

from the panel of twenty (20) that Kendrick Duncan was one of the jurors sworn to try this case together with the other eleven jurors named in the order of April 10, 1953; and it further appearing from the Jury Allowance Book that the said Kendrick Duncan was allowed payment for service on the said day; and it further appearing that the aforementioned quasi record is corroborated (although the Court is of opinion that such corroboration is unnecessary) by the oral testimony of the said Kendrick Duncan that he did in fact serve upon the said jury;

It is, therefore, ordered that the order heretofore entered herein on April 10, 1953, convicting the accused, Stuart W. Newsom, be, and the same is hereby, amended and corrected so as to read as follows, and entered nunc pro tunc as of April 10, 1953:

"Stuart W. Newsom (w), who stands charged with a felony, to-wit: That on the 14th day of June, 1952, he did feloniously kill and murder one James F. Brown, was this day led to the bar in the custody of the Sergeant of the City of Richmond, and also came Percy S. Smith, his attorney. The defendant, being arraigned of said offense, refused to plead. Whereupon, the Court entered a plea of not guilty on behalf of the defendant.

Whereupon, the Sergeant, having returned the Venires Facias, drawn in the manner prescribed by law, and of the number so summoned and attending, a panel of twenty names, free from exceptions for the trial of the defendant was made up and completed. And the Assistant Attorney for the Commonwealth and the attorney for the defendant, having alternately, beginning with the Assistant Attorney for the Commonwealth, each struck from the said panel, the names of four of the said jurors, the remaining twelve constituted the jury for the trial of the defendant, to-wit: Leon

Adkins, Fred S. Brummer, Linwood W. Cobb, Robert H. Harvey, James M. Gary, Walker S. Smith, Rudolph C. Hassell, Harry Sachs, William G. Smith, Kendrick Duncan, George W. Mayo and Chas. H. Tate, who were sworn the truth of and upon the premises to speak, and having fully heard the evidence, the instructions of the Court, and arguments of counsel, were sent to their room in the custody of the City Sergeant to consult of their verdict, and after some time returned into Court with a verdict as follows: "We the jury on the issues joined find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at life imprisonment in the penitentiary."

Whereupon, counsel for the defendant moved the Court to set aside the verdict but gave no grounds in support of his motion. Whereupon, the Court overruled the defendant's motion and the defendant by counsel excepted to the Court's ruling.

Whereupon, it being demanded of the said Stuart W. Newsom, if anything for himself he knew or had to say why the Court should not now proceed to pronounce judgment against him according to law, the said defendant arose and stated to the Court that he should not be sentenced as his attorney had failed to introduce certain evidence on his behalf and asked that he be given ten days within which to produce such evidence, which request the Court denied and to which ruling the defendant objected and excepted. Whereupon, it is ordered by the Court that the said Stuart W. Newsom be confined in the penitentiary for and during his natural life, this being the period by the jurors ascertained.

It is ordered that the Sergeant of the City of Richmond, when required so to do, deliver the said Stuart W. Newsom from the jail of this City to the Superintendent of the Peni-

tentiary, in said Penitentiary to be confined and treated in the manner prescribed by law.

It is further ordered by the Court that the Commonwealth do recover of the said Stuart W. Newsom her costs incident to this proceeding.

Whereupon, the said defendant was remanded to jail."

To which action of the Court, the defendant objected and excepted, and the defendant in person stated his intention to apply for a writ of error and requested the Court to appoint an attorney to prosecute such application. Wherefore, the Court doth designate Arlin F. Ruby, Attorney at Law, to represent the defendant in such application.

APPENDIX V

VIRGINIA:

In the Hustings Court of the City of Richmond, Part II, the 28th day of April 1960.

COMMONWEALTH OF VIRGINIA, *Plaintiff,*

against

STUART W. NEWSOM, *Defendant.*

Order

The Court, heretofore having received direct from the petitioner, Stuart W. Newsom, a petition for a Writ of Error Coram Vobis, the Court, treating the same as a written motion in the nature of a petition for a writ of error coram vobis under section 8-485 of the Code, doth order

the same filed; and the petitioner is permitted to proceed in forma pauperis.

And upon a consideration of the same and being of opinion that the Petition fails to state a case for issuance of the writ or granting of the motion (see Dobie vs. Commonwealth, 198 Va. 762) the Court doth deny the said Petition; to which action of the Court an objection and exception is noted on behalf of the petitioner, Stuart W. Newsom.

APPENDIX VI

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 10th day of October, 1960.

The petition of Stuart W. Newsom for a writ of error to a judgment rendered by the Hustings Court of the City of Richmond, Part II, on the 28th day of April, 1960, in a certain proceeding then therein depending, wherein Commonwealth of Virginia was plaintiff and the petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said hustings court.